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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ELIZABETH FLANIGAN, Plaintiff and Appellant, v. TUDOR INSURANCE COMPANY, Defendant and Respondent.	G040495 (Super. Ct. No. 07CC02136) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

Daniel H. McLinden for Plaintiff and Appellant.

Selvin Wraith Halman, James L. Wraith and Mark E. Inbody, for Defendant and Respondent.

After summary judgment was granted, the trial court dismissed Elizabeth Flanigan's action against Tudor Insurance Company (Tudor) for refusing to defend her under a malpractice insurance policy. She appeals on the basis the policy was erroneously read to deny coverage. We conclude the undisputed facts show there was no coverage, and affirm.

FACTS

This is the third time we consider an easement dispute between Elizabeth and Preston Flanigan and their neighbors in Lemon Heights, Bonnie and Alfred Gausewitz. Initially, we affirmed a judgment that quieted title in the Gausewitzes to an easement over property of the Flanigans and another neighbor (the Toths), after a jury rejected the Flanigans' claim the easement was extinguished by adverse possession. (*Alfred Gausewitz et al. v. Preston Flanigan et al.* (Nov. 27, 2007, G037721) [nonpub. opn.].) When the Flanigans refused to abide by the judgment, we granted a petition for a writ of mandate to compel the trial court to vacate an order that impermissibly modified the judgment in the Flanigans' favor. (*Alfred Gausewitz et al. v. Superior Court* (June 26, 2008, G040021) [nonpub. opn.].)

The instant case involves Tudor's refusal to defend Flanigan in a realty malpractice action consolidated with the easement case.[1] The Gausewitzes purchased their hillside residence in July 2003. Flanigan represented the seller and she was also the owner, along with her husband, of the adjoining property. At the time, Flanigan and Bonnie Gausewitz were both real estate agents employed by Seven Gables Real Estate, Inc. (Seven Gables), a Tustin brokerage company.

The Gausewitz deed included a private roadway easement over the lands of the Flanigans and Toths that was blocked by a locked gate, shrubbery, and other encroachments to the right of way. The Gausewitzes believed they had a right to use the

[1] The facts are drawn from the parties' statements of undisputed facts and the evidence offered on the motion for summary judgment.

roadway and the Flanigans disagreed, believing the easement had been extinguished by adverse possession.

By the end of 2003, the parties were vigorously disputing the easement. In March 2004, the Gausewitzes recorded a notice of intent to preserve the easement and tendered the claim to their title insurance company. In May 2004, a meeting took place at the title insurer's office to seek a resolution. A written settlement was prepared but never signed. According to the Gausewitzes, the parties could not agree. Preston Flanigan said there was an oral agreement but the written proposal differed, and he would not accept the changes. Either way, the dispute continued.

In a September 29, 2004 letter to the Gausewitzes, Preston Flanigan proposed a resolution and said "I do not feel that we need legal documents if we can just resolve this on our own. A hand shake is good enough for me." In a deposition taken in the easement case, Preston Flanigan recalled running into Alfred Gausewitz one day in November 2004. He told him "we had failed to agree by ourselves. We had failed to agree through help that First American [(Gaustewitzes' title insurer)] had tried to provide in a meeting we had there. And unfortunately, it looked like lawsuits may be on the horizon. [¶] . . . so I thought we should try to avoid that. . . . I suggested some compromises in order to avoid a lawsuit and we came to an agreement." What transpired between November 2004 and the spring of 2005 is not revealed.

In March 2005, the Gausewitzes brought the quiet title action against the Toths. They did not sue the Flanigans at the time, believing the parties had agreed the Flanigans would go along with the result of the action against the Toths.

In July 2005, the Gausewitzes commenced a malpractice action against Flanigan. It alleged that at the time Flanigan represented the seller of the property purchased by the Gausewitzes, she failed to disclose several pieces of information – Flanigan and the Toths disputed the validity of the easement, they had erected encroachments in the right of way, and they intended to interfere with any use of the

easement by the Gausewitzes. As a result, the Gausewitzes were compelled to commence the quiet title action to establish their right to the easement. Causes of action were set out for intentional and negligent misrepresentation, negligence, and failure to disclose material information. The remedies sought were compensatory damages, punitive damages, and reasonable attorney fees.

In August 2005, the Gausewitzes amended the quiet title complaint to add the Flanigans as defendants. At some point, the two actions were consolidated and were tried together. It appears the consolidation took place in May or July 2006, although this is not clear from the record.[2]

Tudor had issued a special professional liability insurance policy to Seven Gables for the period from May 1, 2005 to May 1, 2006. It provided coverage for claims first made and reported to the insurer during the policy period. The insured was defined as Seven Gables, its employees, and independent contractors for whom it agreed to provide insurance. One of the conditions to coverage was "the [i]nsured had *no knowledge* prior to the effective date of this policy of such actual or alleged negligent act, error, omission or *circumstances likely to give rise to a claim.*" (Emphasis added.)

The policy further provides "[c]overage . . . does not apply to any loss in connection with or arising out of or in any way involving: [¶] . . . [¶] (F) Any act, error, or omission occurring prior to the effective date of this policy if . . . the insured at the effective date of this policy *knew or could have reasonably foreseen* that such act, error or omission *might be* the basis for a claim or suit[;] . . . (S) [a]ny claim made by any insured against any other insured." (Emphasis added.)

[2] The only evidence from which the date of consolidation can be inferred is the superior court docket sheets for the two cases – the actual consolidation order is not in the record. Flanigan asserts the cases were consolidated at a 2005 case management conference, but she relies on a minute order that does not mention anything about consolidation.

Flanigan notified Seven Gables of the malpractice action. In September 2005, Seven Gables tendered the action to Tudor. Tudor declined coverage and, after Flanigan requested reconsideration, stuck with the denial. The instant action followed.

The complaint alleged Tudor issued its policy to Seven Gables on May 1, 2004.[3] It continued with this: "In or about November 2004 [Flanigan] was threatened with claims by the Gausewitzes that [Flanigan] was responsible for negligent acts, errors and omissions, and circumstances likely to give rise to a claim under the policy. They threatened her with litigation claiming that she should have provided certain facts surrounding an easement when she acted as a real estate agent in the Gausewitzes' purchase of their property." The complaint alleged the malpractice action was tendered and refused by Tudor, as a result of which Flanigan incurred $145,000 in defense costs and suffered emotional distress. Causes of action were set out for breach of contract and breach of the implied covenant of good faith and fair dealing. Punitive damages were sought on the bad faith claim.

Tudor moved for summary judgment on the grounds the "known circumstances" condition, "prior knowledge" exclusion, and "insured against insured" exclusion added up to no coverage, and there was no bad faith because, at a minimum, there was a genuine dispute over coverage. The trial judge agreed with the "known circumstances," "insured against insured," and good faith arguments, granted the motion, and judgment was entered dismissing the action.

DISCUSSION

In view of the allegation in Flanigan's complaint the Gausewitzes threatened to sue in November 2004 over her conduct as a real estate broker, we cannot see how there could have been coverage.

[3] The 2004 date is at odds with the undisputed facts, in which Tudor alleged the policy was issued on May 1, 2005, and Flanigan agreed.

The complaint alleged "[i]n or about November 2004, [the Gausewitzes] threatened [Flanigan] with litigation claiming she should have provided certain facts surrounding an easement when she acted as a real estate agent in the Gausewitzes' purchase of their property." The "known circumstances" condition provides there is no coverage if the insured had "knowledge prior to the effective date of this policy of . . . circumstances likely to give rise to a claim." The only reasonable conclusion is the complaint admits Flanigan knew of circumstances likely to result in a claim against it in November 2004, prior to the effective date of the policy on May 1, 2005. A party is "'bound by the judicial admissions in his own complaint . . . ." *(Heater v. Southwood Psychiatric Center* (1996) 42 Cal.App.4th 1068, 1079-1080, fn. 10.)

In a similar case, a federal court applying Louisiana law affirmed summary judgment for an insurer under a claims made legal malpractice policy. (*Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis* (5th Cir. 1986) 799 F.2d 218.) The policy there contracted for coverage "provided that . . . no insured had knowledge of any circumstance which might result in a claim at the effective date of the . . . policy . . . ." (*Id.* at p. 220.) The law firm tendered defense of a malpractice claim by a former client who had been convicted in a criminal matter. The evidence offered on the summary judgment motion revealed that at the time a binder was issued, attorneys in the firm knew that if the firm sued the client for its fee, the client intended to counter-claim for negligence, and he was "'antagonistic' and 'was looking to blame everyone but himself for the difficulty he then found himself in.'" (*Id*. at p. 223.) As the court put it: "This, then, was not merely a difference about a fee. There was beyond genuine dispute a 'circumstance that might result in a claim' being made." (*Id*. at p. 224.)

We think the evidence here is equally conclusive. Given Flanigan's admission she had been threatened with a malpractice suit over her conduct as a real estate agent, there can be no dispute that she knew prior to the policy period of circumstances likely to give rise to a claim. The undisputed facts establish the "known

circumstances" condition to coverage was not met, so there was no coverage. Tudor was entitled to summary judgment.[4]

Since Flanigan did not satisfy the "known circumstances" condition, Tudor was entitled to summary judgment dismissing this coverage action.[5] The judgment appealed from is affirmed. Tudor shall have its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.

[4] This issue was not decided below, so at oral argument we invited the parties to submit letter briefs on the effect of the November 2004 threat of malpractice litigation alleged in the complaint. (Code Civ. Proc., § 437c, subd. (m)(2).) Flanigan responded with a letter that said she declined to brief the issue.

[5] We do not reach Flanigan's argument the "insured against insured" exclusion does not bar coverage, Tudor's argument the "prior knowledge" exclusion provides a alternative basis for summary judgment, or Tudor's contention it was entitled to summary adjudication dismissing the bad faith claim because there was no genuine dispute over coverage.